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No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1986

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DELVIN RICHARD VAN NICE,
PAMELA JEAN LONG, and
DAVID WAYNE VAN NICE,
*Petitioners,*

v.

STATE OF GEORGIA,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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December 28, 1986

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## QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. Whether standing exists under 18 USC Sec. 2518 and the Fourth Amendment of the United States Constitution to contest the validity of a wire tap warrant due to its being tainted by the fruits of prior illegal acts not involving Petitioners' premises or property, which prior seizure was made in order to gather evidence to obtain a wire tap of Co-Petitioners' home phone.

2. Whether the knowing and intentional use of bogus subpoenas with no case, hearing, or Grand Jury investigations pending to obtain evidence in support of a wire tap warrant violates the precepts of fundamental fairness and decency as guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution or, alternatively, whether standing may be conferred under the Fourth Amendment to the United States Constitution so as to remedy this intentional abuse.

3. Whether an unexplained failure by the State to return and seal tape recordings obtained via a wire tap, in violation of 18 USC Sec. 2518(8)(a), mandates suppression of the recordings and evidence obtained as a result thereof, when there are no allegations of alteration of the recordings.

4. Whether evidence seized as a result of the wiretap should have been suppressed when no facts were set forth on the face of the supporting affidavit and application to establish the inadequacy of alternative procedures, when no facts were set forth to establish why a twenty-day wiretap was required, when no probable cause was set forth on the face of the affidavit and when the affidavit contained reckless and intentional non-truths, all in violation of 18

USC Sec. 2518 and the Fourth Amendment to the United States Constitution.

5. Whether evidence seized as a result of the search of Petitioner's automobile should have been suppressed when no facts were set forth on the face of the supporting affidavit to establish probable cause, when the failure to set forth probable cause was of such a nature that any reasonably well trained officer should have been aware of the failure and when the affidavit contained reckless and material non-truths, all in violation of the Fourth Amendment to the United States Constitution.

6. Whether mere presence at the scene of a suspected crime gives rise to probable cause for arrest and search incidental thereto.

## PARTIES TO THE PROCEEDING

Petitioners, Delvin Richard Van Nice, David Wayne Van Nice and Pamela Jean Long; Respondent, State of Georgia, Co-defendants in proceedings below, Lawrence Duncan and Margaret Duncan.

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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## OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported at 180 Ga. 112 and is reprinted in the Co-Petitioners' Appendix hereto, p. 3a. Rehearing was denied by the Court of Appeals of Georgia without official report, said denial being reprinted in the Co-Petitioners' Appendix hereto, p. 18a. Certiorari to the Supreme Court of Georgia was denied, and rehearing by that Court was also denied, with three of seven justices dissenting, both of which denials were without official report, same being reprinted in the Appendix hereto, pp. 2a and 1a, respectively.

## JURISDICTION

The Superior Court of Chatham County, Georgia, denied Petitioners' motion to suppress by Order dated September 13, 1985, and subsequently, certified that Order as being of such importance that an interlocutory appeal should be granted. The Court of Appeals of Georgia accepted the interlocutory appeal and on July 16, 1986, affirmed the trial court's order, rehearing being denied on July 31, 1986. On October 9, 1986, the Supreme Court of Georgia denied Petitioners' Application for Writ of Certiorari, and on October 28, 1986, rehearing was denied with three of seven justices dissenting. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3).

## STATEMENT OF THE CASE

The within case arose by virtue of a wiretap initiated on March 10, 1983, in Dade County, Georgia, for the home telephone of Lawrence and Margaret Duncan, Co-defendants in the proceedings below. (Appendix 44a). The Duncans are an older couple, Mr. Duncan being 68 years of age.

It was undisputed that Georgia Bureau of Investigation agent Brad Bonnell knowingly and intentionally used bogus subpoenas issued in non-existent cases and that information gained from the subpoenas led directly to the issuance of the warrant for the wiretapping of the Duncans' home telephone and eventually to the seizure of alleged contraband and the arrests of Petitioners. Specifically, Agent Bonnell, through use of the "subpoenas," procured telephone toll records of Mr. and Mrs. Duncan from the Trenton, Georgia, telephone company and also procured treatment records of Mr. Duncan from a Tennessee hospital.

The subpoenas in question recited that the records requested should be produced in court on a day certain, and in lieu of a court appearance, the records could be turned over to G.B.I. agent Bonnell. The subpoenas also recited that Petitioners should not be informed of the release of the information. Bonnell admitted that he did not inform the issuing clerk that no case was pending (Sept. Tran. p. 117), that he did not make returns of the subpoenas (Sept. Tran. p. 120), and that he served one of the subpoenas in Tennessee although he knew he had no legal authority to do so. (Sept. Tran. pp. 128, 157-158)

The affidavit for the warrant itself contained numerous non-truths and stale information. (See Co-Petitioners' Appendix p. 5a). Due to length limitations, Petitioners will herein set forth only some of the more egregious inaccuracies, reserving the right to set forth the additional inaccuracies in their brief upon certiorari being granted. Petitioners would submit, however, that the vast majority of the affidavit is either untrue or deals with individuals other than the Petitioners.

It is undisputed that two persons identified in the application for the wiretap as being actively involved in criminal enterprises with Mr. Duncan, Willie Waldie and Fred Gomez, had in fact been dead for several years prior to the date of the application. (Aug. Tran. pp. 462-464). In fact, these individuals were named in the warrant as being individuals whose phone conversations were to be monitored in that their criminal conversations were of a "continuing nature." (See Co-Petitioners Appendix p. 57a [#6b]).

Further, the affidavit recited that telephone toll records revealed a number of calls from the Duncan residence to the residence of Garland E. Smith in Tennessee, Mr.

Smith was identified in the affidavit as a "major drug trafficking violator." (Co-Petitioners' Appendix p. 71a). Left undisclosed in the affidavit, however, was the fact that Garland Smith is the Duncans' son-in-law and the frequent calls were between the Duncans and their daughter's home. (Nov. Tran. pp. 6-7). Mr. Smith testified at the suppression hearing, without rebuttal, that he has never been involved with drugs (Nov. Tran. p. 6), that he has never been arrested for any crime, that he is an honorably discharged veteran, that he is on the local school board in the area and that he is the Assistant Sunday School Superintendent at his church. Further, the evidence showed that Mr. Smith does not even use alcohol. (Nov. Tran. p. 12). All of this evidence was absolutely uncontradicted and Bonnell finally admitted that the information as to Mr. Smith was not verified prior to its inclusion in the affidavit.

Further still, it was established that agent Bonnell failed to inform the issuing judge that none of the several arrests set forth on the face of the affidavit to establish the credibility of the informants had ever resulted in a conviction. One case was *nolle prossed* due to perjury by a law enforcement officer, and the others were either dismissed or terminated by acquittal.

Again, Agent Bonnell himself testified that he did not verify a number of items of information in the affidavit. Further, he admitted that the names of the two deceased individuals were included in the application as committing and as being about to commit violations of the controlled substances act merely because he had learned that Mr. Duncan had at one time been arrested (and later acquitted) with the two individuals on a gun charge in 1974. He testified that he included in the affidavit the names of every person ever allegedly engaged in criminal activities with

Mr. Duncan regardless of how long ago the offenses were committed. (Sept. Tran., pp. 190-191, 442-444).

Bonnell thus opined that not only were these individuals still presently engaged in criminal activities with Mr. Duncan, but further, that they were engaged in narcotics violations. In short, the affidavit was replete with misstatements, innuendo and half-truths being intentionally calculated to lead the issuing judge to an incorrect conclusion as to probable cause.

It was also undisputed that during the recording of the conversations, the officers used a recording device in addition to the reel-to-reel device authorized by the issuing judge. The additional device was a manually operated cassette recorder. (Sept. 25-28 Tran., pp. 204-207). During monitoring, virtually all "suspect" calls were recorded on the cassette recorder. (Tran., pp. 559-574). The cassettes were admittedly treated as "working tapes" and were not treated as "evidence" and were not preserved with the same eye toward security as were the "official" reel-to-reel tapes. (Tran., pp. 217-218, 256, 559). It is undisputed that the cassette tapes were not sealed at the termination of the surveillance, were not returned to the issuing judge and the issuing judge was never made aware as to their existence. (Sept. 25-28, Tran. p. 313).

The wiretap warrant authorized an interception for twenty days, the maximum period allowed by Georgia law. The District Attorney and Agent Bonnell testified that a wiretap of twenty days was sought because that is "what they normally do" (Aug. Tran. pp. 478-479) and because that was the longest period available. (Sept. Tran. p. 210). In this regard, they testified that had the law provided for a forty-day wiretap then that period would have been sought. (Sept. Tran. p. 450). It was also undisputed

that the wiretap was left in effect and calls were recorded from Petitioners' home phone even after the arrests of Petitioners and Co-Petitioners.

In the course of the interceptions, police officers learned that Mr. Duncan planned a trip from his home in Trenton, Georgia, to Savannah, Georgia, on March 26, 1983. Pursuant to that information, the G.B.I. and the F.B.I. followed Mr. and Mrs. Duncan from Trenton to Savannah. In Savannah, the officers observed Mr. Duncan converse with other individuals occupying a green Cadillac. The next day, the Duncans drove to a K-Mart store where they parked near the green Cadillac. Mr. Duncan left the store with Petitioner Delvin Van Nice and Van Nice drove Mr. Duncan, in the Cadillac, to a private residence. After Duncan and Van Nice entered the residence, Van Nice returned to the Cadillac where he was observed with a small brown box. The officer testified that it appeared that Van Nice took the box and reentered the home. Duncan and Van Nice then left the residence returning to the K-Mart store. As Petitioner Delvin Van Nice, David Van Nice and Pamela Jean Long were leaving the store and walking toward a Cadillac automobile, they were arrested at the direction of Agent Bonnell. A search of Miss Long's purse revealed a small quantity of controlled substances. A warrant was later obtained for the search of both automobiles which yielded diazepam in the trunk of the Cadillac and money and a weapon in the Lincoln.

Because review of the judgment of a state court is sought, the particulars required by Supreme Court Rule 21(h) are included in Co-Petitioners' Appendix H, p. 41(a).

## REASONS FOR GRANTING THE WRIT

### QUESTION ONE

The Court of Appeals of Georgia ruled that "[a]lthough the Duncans have general standing to attack the legality of the wiretap on their telephone, they lack the standing to assert that the illegality is due to the fact that telephone toll records were illegally obtained. 'Like bank records, telephone toll and billing records are not owned or possessed by the Defendant, but are business records belonging to the telephone company . . . .' Thus, Defendants lack standing under the Federal Constitution to challenge the procedure by which the telephone records were obtain- and the warrant to tap which was subsequently issued." Co-Petitioners' Appendix p. 3a

Regardless of whether Petitioners would have standing to contest the seizure of the phone toll records themselves, Petitioners contend that the Court of Appeals of Georgia erred in ruling that Petitioners did not possess standing to contest the wiretap on the basis of the initial underlying illegal seizure of the phone toll records.

At 18 USC Sec. 2510(11) it is provided that a person "aggrieved" by a wiretap is any party to an intercepted conversation or against whom an interception is directed. The wiretap resulted in the monitoring and recording of calls from the Duncan residence to a number registered to Petitioner Pamela Jean Long. (Sept. 25-28 Tran. p. 508). Other calls were made by and to, and referred to the other Petitioners. Agent Bonnell further testified that Petitioners Van Nice and Long worked around the Duncan residence taking their meals there and doing laundry and other odd jobs as occupants/employees. (Sept. 25-28, Tran. pp. 509-510). In 18 USC Sec. 2518(10)(a)(i) it is pro-

vided that any aggrieved individual may move to suppress a communication on the ground that same was "unlawfully intercepted." This statutory provision has been said to parallel in scope the standing provisions of the Fourth Amendment. *United States v. Williams,* 580 F.2d 578, n. 19 (1978). However, the inquiry as to when an accused may properly move to suppress evidence seized as the result of a wiretap on the basis of a prior illegal seizure, when the accused would not have possessed standing to contest the prior seizure, is not easily answered under existing federal law.

In *United States v. Wac,* 498 F.2d 1227 (6th Cir. 1974), it was stated that when facts obtained pursuant to an initial illegal act are "essential in law or in fact" to the issuances of a subsequent wiretap, the subsequent wiretap is fatally tainted by the prior illegality. Although in *Wac, supra,* the issue of standing was not specifically addressed, that issue was addressed in *United States v. Wright,* 524 F.2d 1100 (2nd Cir. 1975). In that case the Court discussed the *Wac* decision in the context of standing.

The Court in *Wright,* held that although the accused therein had standing to contest a subsequent wiretap he was without standing to contest a prior wiretap, the evidence from which was used, in part, to obtain the second tap. The Court, however, was careful to distinguish *Wac, supra,* noting that in that case, as distinguished from the first illegal act was "essential to the granting" of the subsequent wiretap. Thus, by direct implication, the Court in *Wright, supra,* ruled that one may attack a second search due to the illegality of a prior search, regardless of standing to contest the prior search, if evidence from the prior search was essential in law or fact to the second search, c.f., *United States v. Giordano,* 416 U.S. 505, 529-33, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).

Similarly, other circuit courts have held that a subsequent search may be attacked on the basis of a prior tainted search, if the prior illegal search was directed toward an investigation of the Defendant which resulted in the second search. In *United States v. Williams,* 580 F.2d 578, 582, 587 (D.C. Cir. 1978), the Court indicated that standing may be conferred to attack a second wiretap due to the illegality of a prior wiretap if the prior wiretap was conducted on the accused's premises, involved a seizure of his conversations, *or* was directed toward that accused. *Id.* at p. 583. This rule has continued to be followed in wiretap cases even after the decision in *Rakas v. Illinois,* 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978), in which the Court rejected the "target" theory of standing under the Fourth Amendment. The Courts in these Circuits appear to rely upon the language of 18 USC Sec. 2510(11) specifically defining an aggrieved individual as being one against whom the wiretap is directed. *United States v. Civella,* 648 F.2d 1167 (8th Cir. 1981); *United States v. Gambale,* 610 F. Supp. 1515 (D.C. Mass. 1985).

In the present case, even though the phone toll records may technically constitute the property of the phone company, certainly the seizure of these records, relating exclusively to the Duncan phone, was directed at the Duncans and not the phone company. As such, under the rule in *United States v. Williams, supra,* and the above cited decisions, the Duncans could properly move to suppress the wiretap on the basis of the illegality of the prior seizure of the phone toll records. See also in this regard, *United States v. Scasino,* 513 F.2d 47, 49 (5th Cir. 1975).

Other Circuits, however, have ignored the niceties of the above rules and opted for sweeping language to the effect that standing must necessarily be established on an independent basis as to both the first and second searches in

order to attack the underlying validity of the initial seizure. This would apparently hold true regardless of whether the information seized in the first search was essential in law or in fact to the second search and without apparent regard as to whom the initial search was directed. See, *United States v. Fury,* 554 F.2d 522 (2d Cir. 1977); *United States v. Williams,* 737 F.2d 594, 616 (7th Cir. 1984); *United States v. Plotkin,* 550 F.2d 693, 695 (1st Cir. 1977).

From the above, it is clear that a ruling is necessary from this court to determine when standing may be conferred under either or both 18 USC Sec. 2518(10)(a)(i) and the Fourth Amendment to contest the validity of a wiretap due to its being tainted by the fruits of a prior illegal search. Is standing conferred upon an accused merely because he is the individual against whom the wiretap was directed, even though the initial search did not involve his property or premises? Is standing conferred if evidence derived from the initial search is "essential in law or fact" to the validity of the second search? Is standing conferred to contest the second search due to illegality of the first search only when there would be independent grounds for standing under the Fourth Amendment to contest both searches? Is each search viewed in a vacuum or may the cumulative effect of both searches be considered when determining standing?

In the case at hand, a determination of the above questions is crucial in determining whether the Court of Appeals of Georgia erred in its ruling in this case and is essential in resolving the conflict between the Circuits as to the appropriate standard to be utilized.

## QUESTION TWO

It was recognized by the Court of Appeals of Georgia, and was undisputed before the trial court, that the conduct of the G.B.I. agent in this case in using the bogus subpoenas was illegal. Co-Petitioners Appendix p. 3a. See, 1 ABA, *Standards for Criminal Justice, The Prosecution Function,* 3-3.1(d)(2d Ed. 1980) and Advisory Opinion No. 40, State Bar of Georgia, September 1984, which latter opinion concludes that use of such subpoenas constitutes a fraud on all parties concerned. See also, O.C.G.A. Sec. 16-10-20 arguably making such conduct a felony.

It was undisputed that this illegal act was committed by the agent intentionally, on advice from an Assistant District Attorney, and with knowledge of its illegality. Thus, the question is whether the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution mandates that the evidence seized by use of the subpoenas be excluded from evidence, or alternatively, whether standing under the Fourth Amendment should be conferred in order to remedy knowing and intentional violations of the Fourth Amendment.

In *United States v. Russell,* 411 U.S. 423, 431-432, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1974), this Court stated that, "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." Further, such an intentional violation of the law by an individual sworn to uphold the law certainly offends the precepts of fundamental decency and fairness. See, *Rochin v. California,* 342 U.S. 165, 169, 96 L.Ed. 183, 72 S.Ct. 205 (1952); but see, *United States v. Payner,* 447

U.S. 727, 65 L.Ed.2d 468, 100 S.Ct. 2439 (1980), note 9. which indicates that the Due Process Clause comes into play only when the government activity in question violates a protected right of the Defendant as opposed to the rights of another.

In the present case, where the subpoenas were directed exclusively toward phone toll records of the Co-Petitioners' home telephone, undisputedly in an effort to obtain a wiretap warrant for that telephone, one can scarcely conceive of whose rights would be violated if not those of the Defendants, the very individuals sought to be investigated. Constitutional liberties, paid for in the blood of our forefathers, should not depend solely upon "arcane distinctions" developed in the law of personal property. *Rakas v. Illinois, supra,* at p. 43, 58 L.Ed.2d 387, 99 S.Ct. 421. As such, the issuance of the subpoenas must be viewed in the context of the overall search which was admittedly orchestrated to eventually lead to a wiretap on Petitioners' home phone.

Further, numerous state appellate courts have interpreted their respective state constitutions so as to confer standing in the face of intentional police misconduct. See in this regard, *Commonwealth v. DeJohn,* 403, A.2d 1283 (1979); *Commonwealth v. Sell,* 470 A.2d 457, 467 (Pa. 1983); *State v. Sidebotham,* 474 A.2d 1377 (N.H. 1984); *Waring v. State,* 670 P.2d 357 (Ala. 1983); *People v. Blair,* 602 P.2d 738 (CA 1979); *State v. Eder,* 704 P.2d 465 (NM 1985). All of these Courts have recognized the distinction between a good faith blunder by the constable and the constable who himself intentionally commits a criminal act in order to apprehend those whose acts differ, not in king, but only degree.

Because as noted in footnote nine of the decision in *United States v. Payer, supra,* p. 737, 65 L.Ed.2d 468, 100

S.Ct. 2439, this Court has never specifically addressed the important issue of whether the Due Process Clause of the Fourteenth Amendment or the Fourth Amendment would confer a remedy upon those aggrieved by intentional police misconduct, certiorari should be granted. Certainly such a determination is crucial to the Petitioners in this case.

## QUESTION THREE

The Court of Appeals of Georgia ruled that 18 USC Sec. 2518(8)(a) was not violated when law enforcement officers made duplicate tapes and thereupon failed to deliver same to the issuing judge and failed to have same sealed. The Court ruled that "'[t]he reel-to-reel original tapes were kept and returned to court and there is no requirement [State or Federal] that the duplicate recordings be sealed or kept nor is their destruction prohibited when they have served their purpose.' [Citing, *Little v. State*, 157 Ga. App. 462, 465 (1981).] Accordingly, we find no State or Federal violation here." Co-Petitioners' Appendix p. 3a.

Again, it was undisputed that during the monitoring virtually all "suspect calls" were recorded on the cassette recorder. (Tran. p. 559, 574). Cassettes thus obtained were treated as "working tapes" and were available to the officers conducting the surveillance. As such, their whereabouts could not be verified by agent Bonnell during the course of the wiretap. It was also undisputed that the cassette tapes were not sealed and were not delivered to the issuing judge at the end of the surveillance. In fact, the issuing judge was not even aware of the use of the cassette recorder or of the cassette tapes.

At 18 USC Sec. 2518(8)(a) it is provided as follows: "The recording of the contents of any wire or oral com-

munication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under this direction. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years."

In the present case the officers conducting the electronic surveillance chose to ignore the mandates of 18 USC Sec. 2518(8)(a) as set forth above. Similarly, the Georgia Court of Appeals chose to focus exclusively upon 18 USC Sec. 2518(8)(a) which allows duplicate tapes to be made, ignoring the parallel language in the statute requiring that whatever tapes are made shall be delivered to the judge and sealed under judicial supervision.

In addition to the fact that the Court of Appeals failed to address the requirements of the federal statute, certiorari should be granted due to the fact that the federal Circuits are in disarray as to the proper test to determine when the failure to seal wiretap tapes will require suppression. See, *Delay in Sealing or Failure to Seal Tape or Wire Recording as Required by 18 USC Sec. 2518(8)(a) as a Ground for Suppression,* 62 ALR Fed 636.

One view is that suppression is required unless the government presents a satisfactory explanation for the delay, even though the integrity of the recording is unchallenged. This view is based upon the premise that substantial noncompliance with central or functional safeguards in the statutory scheme to prevent governmental abuse should result in suppression. This view focuses upon the fact that electronic wiretapping is unlawful except upon careful

compliance with the terms of 18 USC Sec. 2510, *et seq.* This view also takes into consideration the fact that the Congressional goal in enacting the statute was not only to ensure integrity of the tapes themselves, but also, to ensure that the procedure is overseen and monitored by a detached judicial officer as opposed to the officers engaged in the hot pursuit of evidence.

Under this view, one factor to be considered in determining whether suppression will be required is if the procedures set forth in the statute have been deliberately ignored. In this regard see, *United States v. Johnson,* 696 F.2d 115 (D.C. Cir. 1982); *United States v. Gigante,* 538 F.2d 502, 507 (2nd Cir., 1976; *United States v. McGrath,* 622 F.2d 36 (2nd Cir. 1980).

In the Third, Fourth, Fifth and Sixth Circuits, however, a rule has emerged where an unexplained delay in failing to seal tapes does not require suppression unless the accused presents evidence of actual tampering with the tapes. *United States v. Diadone,* 558 F.2d 775, 780 (5th Cir. 1977); *United States v. Lawson,* 545 F.2d 557, 564 (7th Cir. 1975); *United States v. Falcone,* 505 F.2d 478, 483-84 (3rd Cir. 1974); *United States v. Diana,* 605 F.2d 1307, 1312-16 (4th Cir. 1979). In these Circuits, prevention of tampering with the evidence is seen as the primary objective of the statute and apparently actual tampering would have to be shown in order to require suppression regardless of how egregious the violation of the statute.

This Court should utilize the within case as an opportunity to set forth a uniform test as to when a failure to seal tapes will result in suppression.

As recognized by the Court in *United States v. Johnson, supra,* at p. 124, to demand that the accused present evidence of actual tampering "would vitiate the congressional

purpose in requiring judicial supervision of the sealing process." Obviously, the authority to wiretap is a valuable investigative tool. Wisely, however, the Congress also recognized that the investigative wiretap is a tool which is subject to great abuse if left to the unfettered discretion of the officer in the field. Such unfettered and unchecked use of duplicate tapes is a potential mischief which the law has undertaken to remedy by virtue of direct judicial supervision. The whole scheme of the statute is a balanced approach, allowing the government to obtain hard-to-get evidence where probable cause exists, while still protecting the citizens' right to privacy in all other matters. The unchecked and unfettered use and availability of what the officers themselves may choose to call "working tapes," upsets this delicate balance and effectively negates the detailed statutory scheme. Because in the within case the reel-to-reel recordings were sealed but the duplicate cassette tapes were neither sealed nor accounted for, the question of whether this delicate stautory balance is the critical factor or whether actual prejudice to the accused is the critical factor in determining when suppression will result is clearly presented for determination. As such certiorari should be granted.

## QUESTION FOUR

Probable cause was not set forth on the face of the affidavit or in the application for the search warrant as required by 18 USC Sec. 2518(1)(b) and (3) and by the Fourth Amendment to the United States Constitution. The majority of the contents of same relate to individuals other than Lawrence Duncan and relate to events transpiring long before the affidavit was prepared.

In a nutshell, Agent Bonnell established that Mr. Duncan had in the past known and associated with various in-

dividuals reputed to be criminals. Bonnell sought to establish that these persons had telephoned the Duncan residence, that Mr. Duncan had telephoned them, and thus Mr. Duncan must be up to something.

Bonnell encapsulated the thrust of the affidavit in the second full paragraph of page 13 of same to the effect that, "from the information concerning the telephone numbers of documented drug violators and the analysis of the telephone toll records from the instrument located in the "Duncan" residence . . . combined with the frequency and persons contacted . . . indicates that this particular phone is being utilized by Lawrence L. Duncan to further his criminal endeavors in the area of illegal drug trafficking." In short, Bonnell sought to obtain the warrant as a strategic intelligence gathering tool, which is exactly what the federal wiretap statute was designed to prevent. Strategic intelligence gathering is, of course, working from known criminals to unknown crimes, otherwise known as a "fishing expedition." See, Car, *The Law of Electronic Surveillance,* Sec. 4.05(3)(a)(Clark-Boardman Pub.).

At 18 USC Sec. 2518(1)(b)(iii), it is required that the applicant set forth with particularly the type of communication to be intercepted. 18 USC Sec. 2518(1)(b)(ii) and (iv) require a showing of probable cause that the phone in question is being used to further one of the crimes specified in the statute, as opposed to criminal activity in general.

The only specification in the application at hand as to the conversations which would be intercepted were "all discussions and conversations" of Lawrence Duncan and several other persons therein listed. Again, two of the individuals were later determined to have been dead for several years prior to the application. Certainly this falls far

short of any particularization of the "thing" to be seized as required by the Fourth Amendment.

The application also failed to set forth any facts whatsoever to establish the inadequacy of alternative investigative procedures as required by 18 USC Sec. 2518(1)(c) and (3)(c). Facts, as opposed to boiler plate conclusions, are also required by the terms of the Fourth Amendment to the United States Constitution so that all parties concerned will know what is to be seized and in order to avoid the Fourth Amendment's prohibition against general warrants. See, *Berger v. New York,* 388 U.S. 41, 60, 87 S. Ct. 1873, 18 L.Ed.2d 1040 (1967). See also, an excellent discussion of the necessity rule in *United States v. Costello,* 610 F. Supp. 1450 (D.C. ILL 1985).

In this respect, this Court has stated that wiretapping is "not to be routinely employed as the initial step in a criminal investigation," *United States v. Giordano,* 416 U.S. 505, 515, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), and must not be resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn,* 415 U.S. 143, 153, f.n. 12, 39 L.Ed.2d 225, 94 S.Ct. 977 (1974). See also, *Dalia v. United States,* 441 U.S. 238, 250, 60 L.Ed.2d 177, 99 S.Ct. 1682 (1979).

Apart from the general admonitions set forth above, this Court has yet to address the question of what type of particularized showing is required to establish the necessity for a wiretap and to establish the inadequacy of alternative investigative procedures.

Lower federal courts, however, are generally in accord that a statement of facts must be set forth to establish the inadequacy or unavailability of alternative investigative procedures as opposed to conclusory boiler-plate allega-

tions. Sufficient facts must be set forth in order to enable the judge to determine why, in that particular case, normal investigative procedures are insufficient or why, under the particular facts of that case, same would be too dangerous. *United States v. Lilla,* 699 F.2d 99 (2d Cir. 1983); *In re DeMonte,* 674 F.2d 1169, 1174 (7th Cir. 1977). It is not sufficient to merely characterize the case as a "drug conspiracy" or other type of case which is in general, "tough to crack." *United States v. Abascal,* 564 F.2d 821, 826 (9th Cir. 1977); *United States v. Spagnuolo,* 549 F.2d 705, 710 (9th Cir. 1977). In this regard, the assertion by Agent Bonnell in the affidavit to the effect that from his "experience the only way to investigate fully" an illegal drug enterprise is through use of a wiretap is even more interesting when read in conjunction with his other testimony that this was his first wiretap case. (Sept. Tran. p. 209).

Again, in the case at hand, recitations in the affidavit and application as to the necessity for the wiretap were admittedly lifted verbatim from a prosecutorial handbook which agent Bonnell was using as a guide. (Supp. R., pp. 23, 312, 408). Further, the allegations in the affidavit to establish why in this case a wiretap was necessary were shown to be false. Specifically, allegations in the affidavit to the effect that the house was "fortified" were shown not to be true. District Attorney Lomineck, who made the application for the wiretap, testified that his only recollection as to what Bonnell told him regarding the necessity for the wiretap was that Bonnell could "not get close to" the Duncan house. (Aug. Tran. p. 458). This information was identified as having come from Sheriff Steele of Dade County, Georgia. Sheriff Steele, however, testified that this "fortified" fence was in fact a decorative split-rail fence which does not block the house from view from the highway. (Nov. Tran. pp. 44, 60).

The application was also defective in that no particularized statement was made to show why the authorization should not terminate when the type communication sought was first obtained as required by 18 USC Sec. 2518(1)(d). In fact, it was repeatedly *admitted* that a twenty-day period was sought solely because that is the maximum time allowed under Georgia law and because that is the period of surveillance "usually" sought. (Aug. Tran. pp. 478-479; Sept. Tran. pp. 210, 450). This also runs afoul of the Fourth Amendment's prohibition against searches being extended for a period so long as to render the probable cause "stale." See, *Berger v. New York, supra.*

Finally, the material non-truths as set forth in the statement of the case establishes by a preponderance of the evidence that same were of such a nature as to have either been included intentionally or with a reckless disregard for the truth. In fact, the misrepresenations of fact were so widespread that the District Attorney who applied for the warrant, and Judge Paul Painter who issued same, testified that if they had known of the extent of the non-truths in the affidavit they would not have signed the application and warrant. (Aug. Tran. pp. 116, 465-467). Further, the District Attorney testified that had he been informed of certain of these non-truths, same would have affected his entire opinion as to Agent Bonnell's credibility. (Aug. Tran. pp. 472-473). Similarly, as to the reliability of the informants, no facts were set forth to establish the reliability of the informants as required by *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1984), except facts which were later proven to be untrue or calculated to lead the judge to an incorrect conclusion.

Certiorari should thus be granted in order for this Court to articulate what degree of particularization the affidavit and the application must contain regarding the necessity

for a phone tap warrant, as to why the interception should not terminate upon first obtaining the communication sought, and due to the warrant issuing in this case upon reckless or intentionally false assertions in the affidavit and application for the wiretap warrant.

## QUESTION FIVE

The affidavit for the search warrant of Petitioners' automobile failed to set forth facts to establish probable cause and said failure was such that any reasonably well trained officer should have known that no probable cause existed for the issuance of the warrant and the subsequent search of the automobile.

The affidavit for the search of Petitioners' automobile is set forth at Appendix p. 3a. The affidavit in support of the search warrant for the Cadillac purported to set forth the contents of an intercepted phone conversation wherein an unidentified male allegedly advised Mr. Duncan that his "order was prepared" and that Mr. Duncan should proceed to Savannah on March 26, 1983 to pick up the order. (Supp. R., p. 251).

The affidavit went on to recite that after arriving in Savannah, Duncan made contact with other individuals that were in a green Cadillac and Duncan was later seen meeting with a white male who took a package from the Lincoln into the unidentified male's residence. (Supp. R., p. 251). The affidavit further recited that on Sunday, March 27, 1983, Mr. Duncan was observed operating the green Cadillac and agents saw it return to the unidentified male's residence and a G.B.I. agent subsequently observed another young male transfer a package, about the size of a shoe box, from the house to the Cadillac.

During the Motion to Suppress hearing, however, Bonnell testified that certain particulars in the affidavit for the search of the Cadillac were not true. Specifically, regarding the alleged phone call to Mr. Duncan, contrary to what is stated on the face of the affidavit, the term LSD was not used, but rather, Bonnell testified he was not positive what was said and the secretary who typed the transcript testified that the words actually spoken merely sounded like LSD. (Supp. R., pp. 165-166). Other than this conclusory reference, no mention of any controlled substance was made in the conversation.

It was also indicated in the affidavit that Mr. Duncan travelled to the same residence in Savannah on both Saturday and Sunday. Again, it was recited that Duncan travelled in the Lincoln on Saturday and dropped off a package and then returned on Sunday in the Cadillac and picked up a package. (Supp. R., p. 247, 251). The investigating officers, however, testified that Duncan traveled to a different address on each of the trips. (Supp. R., pp. 90, 94). It is undisputed that this fact was known to Bonnell, the supervising officer, at the time the search warrants were obtained. (Sept. Tran. pp. 523, 524).

Further still, and perhaps most importantly, the G.B.I. agent who allegedly saw the package coming out of the Cadillac testified that in fact he could not determine if the package was coming into or going out of the Cadillac. (Aug. 28-29, Tran. pp. 56-58, 68-69). In fact, Agent Bonnell testified that he believed it had come from the automobile into the house, the opposite from the statement in the affidavit. (Sept. Tran. p. 246). Another bad faith allegation similar to those used in obtaining the wiretap, in violation of the "good faith" test espoused by the Court in *United Staes v. Leon,* 468 U.S. 897, 82 L.Ed.2d 677, 104 Sup.Ct. 3405 (1984).

## QUESTION SIX

Petitioner Pamela Jean Long was arrested with the others as she walked through the K-Mart parking lot from the store towards the area where the Cadillac was parked. Her purse was searched and a small quantity of controlled substances was found. Mere presence at the scene of a suspected crime does not give rise to probable cause to arrest or search incident thereto. *United States v. DiRe,* 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); *United States v. Mitchell,* 783 F.2d 975 (10th Cir., 1986).

## CONCLUSION

For the foregoing reasons, Petitioners request that a writ of certiorari be issued to review the judgment of the Court of Appeals of Georgia in this case.

Dated this 28th day of December, 1986.

/s/ William O. Cox
WILLIAM O. COX

123 E. Liberty Street
Savannah, GA 31402
(912) 233-3804

## APPENDIX A

Clerk's Office, Supreme Court of Georgia

ATLANTA 10/28/86

The motion for a rehearing was denied today:

Case No. 43847, Van Nice et al. v. The State

Smith, Weltner & Bell, J.J., dissent.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

## APPENDIX B

CLERK'S OFFICE, SUPREME COURT OF GEROGIA

ATLANTA 10/9/86

Case No. 43847, Van Nice et al. v. State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur, except Smith, J., who dissents.

Very truly yours,

Mrs. Joline B. Williams
Clerk

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## APPENDIX C

**COURT OF APPEALS**
**of the State of Georgia**

ATLANTA, October 24, 1985

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

APPLICATION NUMBER 3015
DELVIN RICHARD VAN NICE et al v. THE STATE

Upon consideration of the Application for an Interlocutory Appeal, it is ordered that it be hereby granted. The Appellant may file a Notice of Appeal within 10 days of the date of this order. The Clerk is directed to include a copy of this order in the record transmitted to the Court of Appeals.

22-28
084-0333 & 084-0334-C
84-0033
0034
0347
083-1123

**Court of Appeals of the State of Georgia**
Clerk's Office, Atlanta Oct 24 1985

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Alton Hawk
Clerk.

STATE OF GEORGIA )
) CLERK OF SUPERIOR
COUNTY OF CHATHAM ) COURT

I, Susan R. Prouse, Deputy Clerk of the Superior Court of Chatham County, Georgia, do hereby certify:

The annexed and foregoing One (1) page to be a true and correct copy of that certain Order from the Court of Appeals of Georgia in the case of DELVIN RICHARD VAN NICE, ET AL VS. STATE OF GEORGIA: as filed and on record in this office Civil Action Number 084-0333 and 084-0347.

IN WITNESS WHEREOF, I have hereunto set my official signature and affixed the Seal of the Superior Court, at the City of Savannah, County and State aforesaid upon the 19th day of December, in the year of our Lord One Thousand Nine Hundred and Eighty-Six.

/s/ Susan Prouse
Deputy Clerk Superior Court, Chatham
County, Georgia

## APPENDIX D

## SEARCH WARRANT

## MUNICIPAL COURT OF SAVANNAH

## GEORGIA, CHATHAM COUNTY

To the Sheriff of the Municipal Court of Savannah and his lawful Deputies, all and singular the Sheriffs of this State and their lawful Deputies, lawful Constables of this State, the officers of the Chatham County Police Department, the Officers of the Police Department of the City of Savannah, the State Patrol, and all other law enforcement officers and agents authorized to serve search warants, Greeting:

Whereas GBI SPECIAL AGENT BRAD BONNELL has made, sworn to, and subscribed the foregoing affidavit in order to obtain a warrant to search the person of LAWRENCE R. "RED" DUNCAN, MARGARET JENNIE GASS, PAMELA JEAN LONG, DAVE VANNICE AND DELVIN VANNICE and the premises known as (vehicle) A CADILLAC, GREEN IN COLOR WITH A WHITE IN COLOR VINYL LANDAU TYPE ROOF COVER. THIS VEHICLE BEARS A GEORGIA LICENSE PLATE: FJG 523 WITH A DADE COUNTY STICKER. THIS VEHICLE HAS A VIN: 6D47S-6Q209655. SAID VEHICLE NOW LOCATED IN THE PARKING AREA OF A K-MART STORE LOCATED ADJACENT TO THE INTERSECTION OF ABERCORN AND MONTGOMERY CROSSROADS, SAVANNAH, GEORGIA.

Chatham County, Georgia

for the possession (sale) of MARIJUANA, METHAQUALONE, COCAINE AND OTHER CONTROLLED SUBSTANCES in violation of the laws of Georgia; and whereas GBI SPECIAL AGENT BRAD BONNELL has made, sworn to, and subscribed the foregoing affidavit(s) in support of the affidavit of GBI SPECIAL AGENT BRAD BONNELL.

It is the finding of the undersigned, and it is hereby so found and held, that probable cause has been shown under oath and in writing for the undersigned to believe that the property so described is being concealed on the person and premises (in the vehicle) above described, and that the foregoing grounds for application for issuance of a search warrant have been established.

Therefore, you are hereby commanded to search forthwith the person named and premises (vehicles) described for the property specified, and to make such search in the day time (at any time in the day or night). If you find said described property, or any part thereof, in the execution of this warrant, seize the same, together with any discovered item, substance, object, thing, or matter whose possession is unlawful under the laws of Georgia or which is tangible evidence of the commission of a crime, and which may be seized under existing law. Leave with defendant a copy of this warrant and a receipt for the property taken, prepare an inventory of such seized property, and return this warrant to me within ten days from the date, as required by law.,

This 27th day of March, 1983 at 3:40 o'clock P.M.

/s/ Victor H. Mulling
Judge, Municipal Court of Savannah
Victor H. Mulling

## RETURN

After receiving the foregoing search warrant on March 27, 1983, I executed it as follows:

On 27th day of March, 1983, at 1:17 o'clock P.M., I searched the person named and the premises (vehicle) described in the warrant. I left a copy of the warrant with Lawrence R. Duncan, together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

See attached GBI Propety Receipt #'s A1339, A1341, A1338, 55017

This inventory was made in the presence of Lawrence R. Duncan. I swear that this is a true and detailed inventory of all the property.

/s/ BRAD BONNELL

Sworn to and subscribed before me this 29th day of March, 1983.

Victor H. Mulling
Judge, Municipal Court of Savannah

**SUPPORTING AFFIDAVIT FOR SEARCH WARRANT MUNICIPAL COURT OF SAVANNAH**

**GEORGIA, CHATHAM COUNTY**

Personally appeared before the undersigned judicial officer authorized by the laws of Georgia to issue search warrants the subscriber hereto, who being duly sworn, deposes and says as follows in support of the affidavit of GBI SA BRAD BONNELL to obtain a warrant to search the person of LAWRENCE R. DUNCAN, MARGARET JENNIE GASS, RICHARD VANNICE, DAVE VANNICE AND PAMELA LONG and the premises known as (vehicle) A CADILLAC, GREEN IN COLOR WITH A WHITE IN COLOR VINYL LANDAU TYPE ROOF COVER. THIS VEHICLE BEARS GEORGIA LICENSE PLATE FJG 523 WITH A DADE COUNTY STICKER. THIS VEHICLE ALSO BEARS VIN: 6D47s60209655. SAID VEHICLE NOW LOCATED IN THE PARKING AREA OF A Chatham County, Georgia K-MART STORE LOCATED ADJACENT TO THE INTERSECTIONS OF ABERCORN AND MONTGOMERY CROSS ROADS, SAVANNAH, GA for the possession (sale) of MARIJUNA, METHAQUALONE, COCAINE AND OTHER CONTROLLED SUBSTANCES in violation of the laws of Georgia.

On March 10, 1983, a wire tap was activated on telephone number (404) 657-6393 under the authority of an Investigative Warrant issued by Superior Court Judge Paul Painter. The above listed telephone number is listed to Margret Duncan and is located in the residence occupied by Lawrence R. "Red" Duncan. During the course of this investigation it was determined that Lawrence Duncan was

contacted by an unidentified male subject who advised that he had Lawrence Duncan's order prepared and that Duncan should proceed to Savannah, GA on Saturday, March 26, 1983 to pick up his order. Conversation between Lawrence Duncan and this unidentified male subject consisted of secretive and coded language for the apparent purpose of concealing the significant content of their discussion. Terms such as fifty calendars, special smoking tobacco and LSD were used to describe the items available for Duncan. On Friday, March 25, 1983, Affiant personally observed Duncan depart from the community of Trenton, Georgia and travel to Savannah, Ga, arriving during the early morning hours of March 26, 1983. Duncan was observed by investigating officers to make contact with three unidentified individuals (subsequently identified as Pamela Long, Dave Vannice and Delvin Vannice) who were operating the above described vehicle. Duncan was subsedquently observed making contact with a yet as unidentified white male subject and it appeared that one of the two male Vannice subjects transferred a package from Duncan's 1979 Lincoln sedan into the residence of the unidentified male. On Sunday, March 27, 1983, investigating officers observed Lawrence Duncan, operating the above described Cadillac bearing Ga license plate FJG 523, return to the residence of the unidentified male subject which is located on or about Montgomery Cross roads in Savannah, Georiga. GBI Agent Ed Hope subsequently observed a young white male subject transfer a package measuring the approximate dimensions of a shoe box from the residence of the unidentified male subject located on or about Montgomery Cross road, Savannah, Ga into the above described Cadillac. The package was placed into the vehicle in such a way as to indicate that it was being concealed. Investigating officers subsequently apprehended the above listed suspects and seized the vehicles being

operated by the suspects. Investigating Officers subsequently observed suspect marijuana in plain view on the front seat of the Cadillac along with items of paraphernalia utilized in the consumption of controlled substances in the form of cigarette rolling papers.

/s/ Brad Bonnnell
Deponent

Sworn to and subscribed before me this 27th
day of March, 1983

/s/ Victor H. Mulling
Judge, Municipal Court of Savannah
Victor H. Mulling

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Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-1068 and 86-1081

In The

# Supreme Court of the United States

October Term, 1986

LAWRENCE DUNCAN AND
MARGARET DUNCAN,
*Petitioners,*

v.

STATE OF GEORGIA,
*Respondent.*

DELVIN RICHARD VAN NICE,
PAMELA JEAN LONG AND
DAVID WAYNE VAN NICE,
*Petitioners,*

v.

STATE OF GEORGIA,
*Respondent.*

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA**

**CONSOLIDATED BRIEF BY THE RESPONDENT IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI**

MARY BETH WESTMORELAND
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Counsel of Record
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Attorney General

MARION O. GORDON
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WILLIAM B. HILL, JR.
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or call collect (402) 342-2831

24 pp

## QUESTIONS PRESENTED

1.

Whether Petitioners have failed to present the standing question in the federal statutory context under 18 U.S.C. § 2518 to the Court of Appeals of Georgia for its review.

2.

Whether the Court of Appeals of the State of Georgia properly concluded that Petitioners lacked standing to challenge the validity of the wiretap warrant as the alleged illegality related to an entity not a party to the instant proceedings.

3.

Whether there was no due process violation sufficient to justify the exclusion of any evidence in the instant action.

4.

Whether the Court of Appeals of Georgia properly concluded that there was no violation of either the federal or state wiretap laws by the making of a duplicate tape at the time of the wiretap when the reel-to-reel original tapes were kept and returned to the court under proper procedures.

5.

Whether the Court of Appeals of Georgia properly concluded that all requirements of the state and federal wiretap statutes were complied with in relation to obtaining the warrant for the wiretap.

6.

Whether the state court properly concluded that the searches of the two automobiles in question were supported by probable cause.

7.

Whether the Court of Appeals of Georgia properly declined to find any constitutional violation based upon the arrest and search of Petitioner Long.

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**CONSOLIDATED BRIEF BY THE RESPONDENT IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI**

## PART ONE

## STATEMENT OF THE CASE

On March 10, 1983, an investigation warrant was issued for electronic surveillance to be conducted on a telephone at the residence of Lawrence Duncan in Dade County, Georgia. Said telephone was listed in the name of Margaret Duncan. Based on information obtained during

the electronic surveillance, physical surveillance began of the various Petitioners on Friday, March 25, 1983. Said surveillance began in Dade County, Georgia and continued to Savannah, Georgia on a Lincoln automobile. That automobile subsequently rendezvoused with a Cadillac in Savannah. The surveillance continued until the detention of both vehicles in a parking lot in Savannah on March 27, 1983. At that time all Petitioners in the instant action were arrested. Search warrants were obtained for both vehicles and for a house which had been frequented by some of the occupants of the vehicles during the previous few days.

Petitioners were subsequently indicted in the Superior Court of Chatham County on various charges relating to violations of the Georgia Controlled Substances Act. Motions to suppress were filed on behalf of the Petitioners challenging both the wiretap and the search of the automobiles. On September 13, 1985, the trial court denied the motions to suppress.

The Petitioners then filed an appeal from the denial of the motions to suppress in the Court of Appeals of Georgia. In a consolidated opinion from the interlocutory appeal, the Court of Appeals of Georgia affirmed the trial court's denial of the motions to suppress. *Van Nice v. State*, 180 Ga. App. 112, 348 S.E.2d 515 (1986). The Supreme Court of Georgia subsequently denied petitions for writs of certiorari on October 9, 1986. The instant petitions have been filed challenging the decision by the Court of Appeals of Georgia.

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## PART TWO

## REASONS FOR NOT GRANTING THE WRIT

### I. PETITIONERS FAILED TO TIMELY RAISE AN ASSERTION THAT THEY HAD STANDING UNDER 18 U.S.C. § 2518 TO CHALLENGE THE ALLEGED ILLEGALITY OF THE SUBPOENAS.

Petitioners' initial argument relates to an allegation that alleged illegal subpoenas were issued for the production of certain telephone toll records. Petitioners also assert that these telephone toll records served as a basis for the subsequent affidavit and application for the wiretap. Thus, Petitioners assert that the wiretap was illegal.

In the original briefs filed in the Court of Appeals of Georgia, the Petitioners raised this allegation under the Fourth Amendment to the United States Constitution and asserted this allegation under the Georgia wiretap statute. *See* O.C.G.A. § 16-11-67. Petitioners did not mention the federal wiretap statute in relation to this allegation. The Court of Appeals of Georgia resolved the issues based solely upon the Fourth Amendment to the United States Constitution and O.C.G.A. § 17-5-30 and O.C.G.A. § 16-11-67. The court did not refer to the federal wiretap statute in its decision on standing. Petitioners did not raise this statutory concept until after the Court of Appeals of Georgia had rendered its original opinion.

This Court has long recognized that a proper and timely presentation of a federal question in the state court is a jurisdictional prerequisite to review by this Court. *Beck v. Washington*, 369 U.S. 541, 550-4 (1962). Raising

an issue for the first time in a petition for rehearing in the state court is generally insufficient unless the state court actually entertained the petition and decided the question. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 102 (1945); *Herndon v. Georgia*, 295 U.S. 441 (1935). As Petitioners failed to present the federal statutory question to the state court in a timely fashion, certiorari should be denied on this basis. *See also Cardinale v. Louisiana*, 394 U.S. 437 (1969).

## II. ALL PETITIONERS LACK STANDING TO CHALLENGE THE VALIDITY OF THE SUBPOENAS FOR THE TELEPHONE TOLL RECORDS.

The Court of Appeals of Georgia properly concluded that the Petitioners lacked standing to challenge the validity of the subpoenas for the telephone toll records. Petitioners have asserted that the subpoenas were invalid as there was no proceeding pending in any court at the time of the issuance of the subpoenas. Respondent asserts that the Court of Appeals of Georgia properly declined to confer standing upon any of the Petitioners.

In *United States v. Miller*, 425 U.S. 435 (1976), this Court recognized that there was no protectable Fourth Amendment interest in certain bank records which had been subpoenaed. In that case, the grand jury subpoenas were issued in blank by the clerk requiring an appearance and a production of the records on a date certain. The bank records were obtained and subsequently used in the investigation. This Court held that there was no intrusion into any area in which the defendant had a protected Fourth Amendment interest and concluded that there was

no legitimate expectation of privacy in the contents of those documents. *Id.* at 440. The Court also noted that a subpoena was not subject to the same strict requirements as search warrants. *Id.* at 440 n.8. Furthermore, in a footnote, the Court noted that the banks did not contest the validity of the subpoenas, implying that only the banks would have standing to challenge the subpoenas. *Id.* at n.9.

In the instant case, Petitioners are challenging the seizure of certain telephone toll records for the telephone in the name of Margaret Duncan. These records belong to the telephone company and are not individual records of any of the Petitioners. In relation to Petitioners Delvin and David Van Nice and Long, the Court of Appeals of Georgia properly concluded that these Petitioners were not aggrieved by the wiretap itself, noting that to be aggrieved "the violation must have occurred on the movants' premises or the unlawfully heard conversation must have been of the movants themselves in order to suppress the evidence." *Van Nice v. State, supra.* As noted by the court, neither was the case as it applied to Petitioners Long, Delvin and David Van Nice. Thus, clearly none of these Petitioners have standing to challenge the wiretap itself, much less the subpoenas from the toll records.

The Court of Appeals of Georgia noted properly that the Duncans would have general standing to attack the legality of the wiretap as it was on their telephone, but properly concluded that the Duncans lacked standing to assert that any illegality in the wiretap was due to the manner in which the telephone toll records were obtained. That court properly concluded that the telephone toll rec-

ords were not owned by the individual Petitioners and that there was no privacy right violated by the obtaining of these records. Thus, the court properly concluded that there was no standing under the federal constitution to challenge the procedure by which these telephone toll records were obtained. Respondent submits that this is a correct holding under the principles of *United States v. Miller, supra.*

The court also concluded that Petitioners Duncan did not have a basis for a claim under O.C.G.A. § 17-5-30 as they were not "aggrieved" by the seizure of the toll records and the records belonged to the telephone company. Respondent submits that the Court of Appeals of Georgia correctly applied the principles of law set forth by this Court in determining that Petitioners Duncan lacked standing in regard to the Fourth Amendment issue.

Finally, even though the issue was not timely raised, Respondent also asserts that Petitioners lack standing to challenge the validity of the subpoena even under the federal wiretap statute. Petitioners were not aggrieved by the subpoenas and the records obtained did not belong to the Petitioners but belonged to the telephone company. The only person actually having the authority to challenge the validity of the subpoenas would be the telephone company itself. In fact, certain similar information was also obtained through a pen register device and the information in question could also have been obtained through a pen register device. Thus, Respondent asserts that this allegation simply fails to state a constitutional question for review by this Court.

## III. PETITIONERS HAVE ESTABLISHED NO DUE PROCESS VIOLATION BY THE UTILIZATION OF THE SUBPOENAS IN QUESTION.

Petitioners next assert that the alleged illegal subpoenas constituted a sufficient violation of the due process clause to require the granting of relief. Respondent submits that Petitioner has failed to show any government action which would justify the finding of a due process violation.

In *United States v. Payner*, 447 U.S. 727 (1980), this Court noted that a petitioner's Fourth Amendment rights were violated only when the challenged conduct invaded his own legitimate expectation of privacy rather than that of a third party. Thus, the Court found a lack of standing under the facts of that case. The Court also cited to *United States v. Miller*, noting that the depositor in *Miller* had no expectation of privacy in copies of checks and deposit slips on record with the bank. In *United States v. Payner*, the Court did not condone the conduct, but noted that even the conduct in that case did not command exclusion in every case of probative but tainted evidence. The Court emphasized the costly toll on the ability of the courts to ascertain the truth in criminal cases. The Court further noted in a footnote, that the same reasoning would apply to a due process claim and that such would arise only when there was some violation of a protected right of a particular defendant in question.

Respondent submits that there was no due process violation shown in the instant case as Petitioners have failed to show that any subpoenas violated any of their

protected constitutional rights. Further, Petitioners have failed to show that there was any action which was "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 432 (1974). Thus this allegation fails to state a constitutional issue for review by this Court.

## IV. THE COURT OF APPEALS OF GEORGIA PROPERLY FOUND NO VIOLATION OF EITHER THE STATE OF THE FEDERAL WIRETAP STATUTE BY THE UTILIZATION OF DUPLICATE CASSETTE TAPES.

Petitioners have asserted that 18 U.S.C. § 2518(8)(a) was violated by law enforcement officers making duplicate tapes from the original wiretap. Respondent submits that the Court of Appeals of Georgia properly found no constitutional violation in this regard.

The tapes in question were cassette tapes which were made at the same time that the original reel-to-reel tapes were made during the wiretap monitoring. The cassette recorder was activated manually and substantive conversations were taped to allow the officers to have a work tape with which to supplement their logs without having to utilize the original tapes. There is no question that the original reel-to-reel tapes were protected and preserved as required under the state and federal wiretap statutes.

The Court of Appeals of Georgia correctly concluded that the federal wiretap statute anticipates the making of such partial or duplicate tapes and does not require judicial approval for such duplication. In fact, 18 U.S.C. § 2518

(8)(a) states in part, "duplicate records may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of Section 2517 of this chapter for investigations." Similarly, Georgia law also does not prohibit the making of duplicate records. As noted by the Court of Appeals of Georgia the original tapes were kept and returned to the court and they were properly preserved. The cassette tapes were utilized in maintaining the surveillance log and in taking notes. The tapes were secured by the G.B.I. agent, who also had the cassette tapes in his possession at the time of the hearing on the motions to suppress. No showing has been made of any taint to either the cassette tapes or the originals nor has there been any showing of any improper publication of any of the tapes. Thus, Respondent submits that there has been no violation of the federal wiretape statute.

## V. PETITIONERS HAVE SHOWN NO VIOLATION OF THE FEDERAL WIRETAP STATUTE IN THE OBTAINING OF THE WARRANT FOR THE WIRETAP WHICH WOULD JUSTIFY THE SUPPRESSION OF ANY SUBSEQUENTLY OBTAINED EVIDENCE.

Petitioners assert that probable cause was not set forth on the face of the affidavit or in the application for the warrant for the wiretap. In the petitions before this Court, the Petitioners assert certain alleged inaccuracies in the original affidavit for the warrant for the wiretap as a basis for this allegation. Petitioners have also asserted that the application failed to contain any facts showing the inadequacy of alternative investigative procedures and assert that no showing was made why the authorization should not have terminated earlier. Petitioners also assert that there

were reckless or intentional assertions which were false in the affidavit and the application. Respondent asserts that Petitioners have failed to set forth a sufficient basis for a finding that the Court of Appeals of Georgia misapplied federal law.

Respondent initially submits that it is clear there was probable cause for the judge to issue the warrant for the wiretap. Furthermore, even though it later turned out that certain immaterial facts were not correct in the original affidavit, there has been no showing that there was an intentional or reckless statement of facts.

The affidavit submitted contained information showing that Lawrence Duncan and his associates had long been involved in activities relating to the distribution of narcotics. The heavy use of the telephone between Duncan and these inviduals would lead a reasonable person to believe that the telephone was being used to facilitate the distribution of narcotics. The investigation warrant was specific in that it authorized the interception of conversations related to these activities.

As to the alleged inaccuracies in the affidavit, the testimony at the motion to suppress hearing clearly substantiates the fact that the affiant, G.B.I. agent Bonnell, believed the information to be true at the time he presented the affidavit. Furthermore, the inaccuracies were not such as to conclude that probable cause has not been shown. The information showed that even though the affidavit stated that Charles Edward Fleming had been arrested in the possession of five kilograms of cocaine, Agent Bonnell subsequently learned that it was only three kilograms of cocaine. The affidavit also reflected that an agent had

purchased one pound of cocaine from Emanuel Fleming who was stated in the affidavit to be the oldest son of Charles Edward Fleming, Sr.; however, it was later learned that Fleming had a son older than Emanuel Fleming. Further, Agent Bonnell in his affidavit stated that the elder Fleming had been indicted in the above incident and testified at the hearing that he believed that that was the information relayed to him. It was later learned, however, that Mr. Fleming had not been indicted at the time of the affidavit, although he was being considered for indictment. The affidavit also stated that certain drugs were found in the residence of Connie Fleming Williams, when in fact the drugs were found outside of the dwelling but on her property.

The further alleged inaccuracy concerns a statement relayed by investigator Griffin to Agent Bonnell. Agent Bonnell in his affidavit stated that he had been advised that the information concerning the shooting of Florence Duncan came from persons directly involved with participants in the shooting; however, investigator Griffin indicated that his information came from persons directly involved in the drug deal related to the shooting, but not directly involved in the shooting itself.

Agent Bonnell specifically testified that he made no intentional misstatements and that he believed all the information that he stated in the affidavit was true at the time that he gave the information to the court. Thus, Petitioners have failed to show any intentional or reckless falsehood as Agent Bonnell fully believed all the information to be true at the time he made the affidavit and as it has also been shown that none of the inaccuracies were such as

to reflect on the materiality of the facts set forth in the affidavit. *See Franks v. Delaware,* 438 U.S. 154, 178 (1978).

The Petitioners further assert that two of the persons listed in the affidavit as persons involved with the Duncans had been dead for several years at the time of the making of the affidavit. Again, even though this subsequently turned out to be true, Agent Bonnell testified at the hearing on the motions to suppress that he did not know that to be a fact at the time of the making of the affidavit and, in fact, had no basis for such knowledge. He was presenting the trial court with as much information as he could on the background of the Duncans and reasonably relied on the information provided to him. Thus, again, there has been no showing of intentional or reckless falsehood in relation to this information.

Petitioners also assert that there was no showing as to the unavailability of alternative investigative measures. Respondent submits that the affidavit does establish that alternative investigative procedures would not be successful. Agent Bonnell in his affidavit noted the secrecy involved in the operation and the fact that the informants had not identified everyone involved. There was also information that Duncan had been arrested for a multitude of violations and was aware of the techniques used in covert investigations. The police had failed to make a case even though the operation had been in existence for a long period of time. The informants would not testify at any court proceeding due to fear of physical harm or death. Furthermore, the agent displayed photographs of the residence to the issuing judge showing the isolated nature of the locale and also showing the fence placed around the resi-

dence as well as the gate on the fence and bars placed on the windows.

The testimony presented at the motion to suppress hearing amply supported the information contained in the affidavit. It was established that the location in question, Sand Mountain, was a close knit community and that any attempts to make an intrusion therein would be noticed and reported to the Duncans. The officers reiterated the fact that there was no way to reasonably approach the residence without being observed and also noted the fence around the residence. Respondent submits that all of this information was clearly sufficient to show to the issuing court that other investigative procedures not only would be futile, but had been futile in the past. Thus, Petitioners have failed to show a violation of the federal wiretap statute.

Petitioners finally assert that a sufficient showing was not made to authorize a 20 day wiretap. Respondent submits that a sufficient showing was made. The affiant and the district attorney stated that time was needed to obtain information on as many participants involved in the drug organization as possible, noting that it was a continuing course of illegal conduct and that the identity of those persons providing the controlled substances and those facilitating delivery needed to be obtained. (Supplemental record 1, 15-16; 20, 25). Based upon the nature of the crimes in question and the information provided to the judge that this was an ongoing criminal enterprise, it is clear that sufficient justification was presented to allow the court to authorize a wiretap for 20 days.

Based upon all of the above, Respondent submits that Petitioners have simply failed to show any violations of 18 U.S.C. § 2518; therefore, no federal questions are presented for review of this Court. Thus, Petitioners have shown no basis for the granting of certiorari.

## VI. THERE WAS SUFFICIENT PROBABLE CAUSE TO JUSTIFY THE GRANTING OF SEARCH WARRANTS FOR THE TWO AUTOMOBILES IN QUESTION.

Petitioners have asserted that there was not sufficient probable cause to justify the search warrants for the Lincoln and Cadillac automobiles. Respondent submits that Petitioners have shown no constitutional violation in this regard.

Petitioners Duncan challenge the search of their Lincoln automobile, while Petitioners David and Delvin Van Nice and Petitioner Long challenge the search of the Cadillac automobile. Respondent asserts that probable cause was shown and the search warrants were properly issued to search both automobiles.

In relation to the search of the Cadillac automobile and the challenge of Petitioners Delvin and David Van Nice and Long, the Court of Appeals of Georgia noted the following:

> The affidavit in support of the warrant discussed the phone conversation in which Mr. Duncan was instructed to go to Savannah to pick up his order, the following of Duncan to Savannah, investigators' observation of various contacts and interactions between Duncan and the Van Nices, and the use of the Cadillac by Mr. Duncan and Delvin Van Nice to go to the private residence. Included also was information that a GBI

> agent had observed a package transferred from the private residence to the Cadillac where it was placed in the vehicle "in such a way as to indicate that it was being concealed." Noted, too, was that suspected marijuana was observed on the car's front seat in plain view as were cigarette rolling papers, "item[s] of paraphernalia utilized in the consumption of controlled substances."

*Van Nice v. State, supra.* The Court of Appeals found that the affidavit "provided a substantial basis for concluding the auto contained evidence of wrongdoing." *Id.* The court went on to conclude that the fact that the affidavit had recited the G.B.I. agent observed a package being transferred from the residence to the automobile, whereas the later statement by the agent was equivocal as to whether the transfer actually was from the house to the automobile or from the automobile to the house, would not be fatal to the warrant. The court concluded that this was simply a minor factual inaccuracy which would not undermine the probable cause shown. The court did not specifically find that the Van Nices and the Longs both had standing to contest the auto search, but simply assumed that they did. Clearly, should the search be found to be invalid, a further question would be presented as to the standing of all parties involved.

As to the search of the Lincoln automobile in relation to the Duncans, the Court of Appeals of Georgia simply found this allegation to be without merit. The record establishes, as do the affidavits in support of the warrants, that transfers were made between both vehicles in question and the house on Montgomery Crossroads. Once again, Respondent asserts that a simple review of the affidavit

shows that there was sufficient probable cause set forth to justify the issuance of a search warrant.

As noted by this Court in *Illinois v. Gates,* 462 U.S. 213 (1983), a grudging attitude toward search warrants would be inconsistent with the Fourth Amendment principles. "So long as the magistrate had a 'substantial basis for . . . concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.' " *Id.* Clearly, in the instant case the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing based upon the facts presented in the affidavits. Respondent further submits that the police officers in question clearly acted in good faith reliance on the search warrants issued. In such circumstances, there is a strong preference for warrants; thus, "the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *United States v. Leon,* — U.S. —, 104 S.Ct. 3405, 3417 (1984). Of course, this does not preclude inquiry into the knowing or reckless falsity of the affidavit. It has not been shown in the instant case, however, that there was any knowing falsity presented in any of the affidavits or that there was any reckless presentation of false information. Finally, Respondent submits that as required by *Illinois v. Gates, supra,* the affidavit did provide the magistrate with a substantial basis for determining the existence of probable cause.

This Court has recently noted in *United States v. Leon, supra,* that there is no basis "for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magi-

strate." *Id.* at 3418. Therefore, "imposition of the exclusionary sanction is not necessarily meaningful to inform judicial officers of their errors, and we cannot conclude admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests." *Id.* Thus, this Court specifically concluded that suppression of evidence obtained pursuant to a warrant "should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.* at 3419.

In the instant case, as the officers presented information in the affidavits which they believed to be true at the time it was given and as any inaccuracies have been shown to be immaterial and as the magistrate had sufficient probable cause presented to him to issue the warrants, any exclusion of evidence in the instant case would simply not further the purposes of the exclusionary rule. Thus, no basis has been shown for the granting of certiorari in regard to this allegation.

## VII. THE SEARCH OF PAMELA JEAN LONG WAS JUSTIFIED AS A SEARCH INCIDENT TO ARREST.

Petitioner Long has finally challenged the search of her person and her purse at the time of her arrest. Respondent submits that this was a valid search incident to arrest.

The information known to the law enforcement officers at the time of the arrest was that all persons arrested appeared to be involved in a conspiracy relating to drug trafficking. Agents had monitored phone calls relating to drugs. On March 24, 1983, Lawrence Duncan received a phone call from a person named Raoul stating that he had various items for Duncan which appeared to be codes for drugs. Raoul's vehicle was supposed to arrive in Savannah on Friday morning and he would be at the usual place on Saturday morning. On Friday the Duncans drove to Savannah where they met another vehicle from Dade County on early Saturday morning, this being the vehicle belonging to the Van Nices. On Saturday and Sunday both vehicles engaged in furtive maneuvers. Numerous telephone calls were made and packages were observed moving between the vehicles and a residence on Montgomery Crossroads. The vehicles arrived at the K-Mart parking lot and the occupants appeared to look for surveillance. The arrest was made with the cars together in the lot.

Under Georgia law, conspiracy may be shown by inference and deduction from conduct which shows common design on the part of the persons to act together for the accomplishment of the unlawful purpose. *See Wireman v. State*, 163 Ga. App. 439, 440, 295 S.E.2d 530 (1982). Under the circumstances of the instant case, the officers were justified in concluding that a conspiracy was ongoing and that Petitioner Long was a participant in this conspiracy. Thus, there was probable cause to arrest Petitioner Long and due to the exigent circumstances, there was probable cause to search her person. Therefore, Petitioner Long has shown no Fourth Amendment violation by this allegation.

## CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully prays that the petitions for writs of certiorari filed on behalf of the various Petitioners be denied.

Respectfully submitted,

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